IN THE SUPREME COURT OF THE STATE OF NEVADA

JESUS A. OROZCO,

Appellant,

v.

THORNTON CONCRETE PUMPING, and entity of unknown origin d/b/a LAS VEGAS PUMPING SERVICES,

Respondent.

No. 57364

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RESPONDENT'S ANSWERING BRIEF

Appeal from Summary Judgment
Eighth Judicial District Court, Clark County

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STATEMENT OF ISSUES

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B. Appellant's reliance on Ortega is misplaced and confused

C. Alternatively, whether THORNTON qualifies as an employee under the *Meers* test

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A. There is No Requirement that Respondent Obtain a Money Judgment in Order to Recover Attorney's Fees under the Applicable Standards

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C. The Record Reflects That the Trial Court Properly Considered the *Beattie* Factors, Making Its Award of Attorney's Fees Proper

INTRODUCTION AND STATEMENT OF RELEVANT FACTS

The issue that was resolved by the trial court and subsequently appealed is straight-forward and based on a small set of generally undisputed facts. Simply put, Respondent-Defendant THORNTON was a subcontractor and the statutory employee of a licensed principal contractor Marnell Corrao (hereinafter "Marnell") and the statutory co-employee of Appellant-Plaintiff OROZCO at the time of the accident wherein Plaintiff was injured. Because THORNTON and Plaintiff are statutory co-employees, THORNTON is entitled to immunity under the Nevada Industrial Insurance Act ("NIIA") for the claims brought against it. As a result, judgment was properly entered in favor of THORNTON on all claims.

This case arose from an accident which occurred on March 16, 2004, at a construction site for the Wynn Hotel. *Record on Appeal ("ROA")* at 104-113. THORNTON entered into a subcontract with Marnell to furnish a portion of the labor, materials, equipment and services to be supplied on the construction of a tower for the Wynn Hotel and Casino. *ROA* at 151 *et seq.* Marnell was the general contractor for the project, and OROZCO was Marnell's employee. *ROA* at 107. Plaintiff was on one end of a hose, pouring concrete, with an employee of THORNTON on the other end operating the concrete pump, when the concrete pump boom broke and, quite unfortunately, fell on OROZCO. *ROA* at 107. THORNTON was required to buy into Marnell's owner controlled insurance policy ("OCIP"), which subsequently paid well over $100,000 in worker's compensation benefits to Plaintiff for the injury at issue in this case. *ROA* at 156, 160.

Tellingly, Marnell was not a party to this action due to its immunity under the NIIA. The equipment which caused Plaintiff's injuries was owned by Concrete Pump Repair and manufactured by Schwing America, Inc., both of whom settled with Plaintiff for the sum of $800,000. *ROA* at 143-148. Subsequent investigation (confirmed both by OSHA and the project owner Wynn) revealed that the cause of the accident was a manufacturing defect, specifically a failure of hidden internal welds. *ROA* at 104-119.

The pump manufacturer has since admitted its sole responsibility and even issued a safety notice regarding the possibility of similar incidents. *ROA* at 121-131.

Importantly, the trial court made the following findings of fact (*ROA* at 369), which must not be disturbed on appeal unless clearly erroneous, at the time of summary adjudication in this matter:

1. The accident occurred at a construction site.
2. The construction project and site were owned by the Wynn Hotel and Casino ("Wynn").
3. Wynn hired a general contractor to oversee and construct the project.
4. That general contractor was Marnell Carrao.
5. Marnell Carrao was a licensed general contractor, pursuant to NRS Chapter 624.
6. Marnell Carrao was Plaintiff OROZCO's direct employer.
7. At the time of the accident, Plaintiff was working at the construction site.
8. At the time of the accident, Plaintiff was working in the course and scope of his employment with Marnell Carrao.
9. THORNTON, like Plaintiff, was directly hired by the general contractor Marnell Carrao.
10. As a concrete pumping business, THORNTON was not required to be a licensed under NRS Chapter 624.
11. THORNTON was working under a written subcontract between itself and Marnell Carrao.
12. At the time of the accident, THRONTON was working in the course and scope of its subcontract with Marnell Carrao by providing concrete pumping services.
13. Plaintiff was on one end of a hose, pouring concrete, with an employee of THORNTON on the other end operating the concrete pump, when the concrete pump boom fell on OROZCO.
14. THORNTON'S scope of work was a subcontracted fraction of the contract between Marnell Carrao and the Wynn Hotel and Casino.

15. THORNTON was required to, and did, buy into Marnell Carrao's Owner Controlled Insurance Program, which covered the project.

SUMMARY OF ARGUMENT

Importantly, none of the facts Plaintiff argues are in dispute change the fact that Defendant is entitled to immunity as a matter of law. The only issue of importance is whether or not Defendant is a statutory employee for purposes of the NIIA, which has been established in the underlying motion for summary judgment and the trial's court findings of fact and conclusions of law. There is no dispute that Marnell is a licensed general contractor. There is no dispute that THORNTON signed a subcontract with Marnell. There is no dispute that THORNTON provided labor, services and materials at the jobsite. None of the facts Plaintiff argues to be in dispute affect whether THORNTON is entitled the immunity under the NIIA. Plaintiff has not credibly challenged the findings of fact made at the trial court, and has wholly failed to prove those findings clearly erroneous. *See* NRCP 52(a).

The facts Plaintiff argues about are facts that Plaintiff believes would support a cause of action for negligence. However, even if Defendant had been negligent as Plaintiff argues (and Defendant vehemently denies), any cause of action based thereon would be barred by the NIIA. *See*, *Jackson v. Southern Pacific Co.*, 285 F. Supp. 388, 390 (D. Nev. 1968). Therefore, the only "genuine issues of material fact" of import to the motion for summary judgment are those that pertain to THORNTON'S status as an employee under the NIIA and, as discussed below, there are no genuine issues of material fact in dispute.

Nevertheless, Plaintiff's insistence that the NIIA immunity does not apply in this instance turns on two central points of confusion: (1) Plaintiff's reading of the relevant cases to require that a party be a licensed contractor in order to be considered not a statutory employer, but even a statutory co-employee, and (2) Plaintiff's reliance on a similar fact pattern in the outdated and arguably overruled precedent of *SIIS. v. Ortega Concrete Pumping, Inc.*, 113 Nev. 1350 (1997) (*"Ortega"*).

ARGUMENT

I. WHETHER THE DISTRICT COURT WAS CORRECT IN FINDING THAT THE NIIA GRANTS THORNTON IMMUNITY AS A STATUTORY CO-EMPLOYEE OF OROZCO AND GRANTING SUMMARY JUDGMENT

The standard of review of an appeal from a summary judgment is de novo. *See Maine v. Stewart*, 109 Nev. 721, 726, 857 P.2d 755, 758 (1993); *Walker v. American Bankers Ins.*, 108 Nev. 533, 536, 836 P.2d 59, 61 (1992). Additionally, "questions of law are reviewed de novo." *SIIS v. United Exposition Services Co.*, 109 Nev. 28, 30, 846 P.2d 294, 295 (1993). "Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731 (2005) (internal citations omitted). "While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered in the moving party's favor." *Id.*; *quoting*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

It is important to view the record in the context of the requirements for summary judgment because there is only a small set of facts that give rise to THORNTON'S immunity and entitle it to judgment as a matter of law. These facts have been embodied in the trial court's findings of fact in its pending orders and must not be overturned on appeal unless they are *clearly erroneous*. NRCP 52(a).

Most importantly here, "the substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Wood*, *supra*, 121 Nev. at 731. "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* Plaintiff argued that there were numerous "factual disputes" in the trial court, mostly relating to whether or not Defendant was negligent. However, the material facts – those that give

rise to Defendant's NIIA immunity – are not in dispute. Because Defendant is entitled to NIIA immunity, the facts pertaining to the issue of negligence become irrelevant because summary judgment would not be precluded even if, *arguendo*, Defendant had been negligent.

A. Whether THORNTON is an employee, as defined by NRS 616A.210, because THORNTON was a subcontractor of licensed general contractor Marnell

Compensation by the Nevada Industrial Commission is an employee's sole remedy, exclusive of any rights of a common-law action against employer, where employee incurs an injury as a result of an accident which arose out of and in the course of his employment. *Frith v. Harrah S. Shore Corp.*, 92 Nev. 447, 452 (1976). This immunity applies to actions between statutory co-employees, as defined by the NIIA. *Richards v. Republic Silver State Disposal,* 122 Nev. 1220 P.3d 684, 689 (2006). Notably, "Nevada's Industrial Insurance Act is 'uniquely different' from industrial insurance acts of some states in that ***sub-contractors*** and independent contractors ***are accorded the same status as 'employees.***'" *Argonez v. Taylor Steel Co.*, 85 Nev. 718, 720 (1969) (emphasis added). Therefore, as Defendant demonstrated in the lower court, because THORNTON was a subcontractor of Marnell, it was an "employee" of Marnell for purposes of the NIIA.

NRS 616A.210[1] provides: "[e]xcept as otherwise provided in

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[1] NRS 616A.210 "Employee": Subcontractors and employees.
1. Except as otherwise provided in NRS 616B.603, subcontractors, independent contractors and the employees of either shall be deemed to be employees of the principal contractor for the purposes of chapters 616A to 616D, inclusive, of NRS.
2. If the subcontractor is a sole proprietor or partnership licensed pursuant to chapter 624 of NRS, the sole proprietor or partner shall be deemed to receive a wage of $500 per month for the purposes of chapters 616A to 616D, inclusive, of NRS.
3. This section does not affect the relationship between a principal contractor and a subcontractor or independent contractor for any purpose outside the scope of chapters 616A to 616D, inclusive, of NRS.

NRS 616B.603[2], subcontractors, independent contractors and the employees of either shall be deemed to be employees of the principal contractor for the purposes of chapters 616A to 616D, inclusive, of NRS." *See also*, *Argonez*, *supra*, 85 Nev. at 720. Under the NIIA, extended immunity generally automatically applies to matters involving a project executed within the scope of an NRS Chapter 624-licensed contractor's license.

It has never been disputed that Marnell was a licensed general contractor. Further, it cannot be reasonably disputed that THORNTON was a subcontractor of Marnell because it is undisputed that THORNTON signed a subcontract with Marnell. Because Marnell is a principal contractor, licensed pursuant to NRS 624, immunity is extended to all Marnell's employees, and the exception codified in NRS 616B.603 does not apply. This analysis has been applied to grant immunity between employees of different subcontractors that were all working under a principal contractor, as was the case here. *Howard v. Eighth Judicial Dist. Court*, 98 Nev. 87 (1982) (immunity between subcontractors in different "lines of work" employed by same principal contractor at different times).

THORNTON is entitled to co-employee immunity just as if it were an individual

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[2] NRS 616B.603 Independent enterprises.
1. A person is not an employer for the purposes of chapters 616A to 616D, inclusive, of NRS if:
(a) The person enters into a contract with another person or business which is an independent enterprise; and
(b) The person is not in the same trade, business, profession or occupation as the independent enterprise.
2. As used in this section, "independent enterprise" means a person who holds himself or herself out as being engaged in a separate business and:
(a) Holds a business or occupational license in his or her own name; or
(b) Owns, rents or leases property used in furtherance of the business.
3. The provisions of this section do not apply to:
(a) A principal contractor who is licensed pursuant to chapter 624 of NRS.
(b) A real estate broker who has a broker-salesperson or salesperson associated with the real estate broker pursuant to NRS 645.520.
4. The administrator may adopt such regulations as are necessary to carry out the provisions of this section.

hired by Marnell as Plaintiff's co-employee. According to *Richards*:

> [T]he initial inquiry looks at whether the injured employee and other parties were, when the injury occurred, carrying out work under **some** principal contractor's NRS Chapter 624 license. Contractors working, **ultimately**, under an NRS Chapter 624 license are entitled to NIIA immunity for claims arising from employee injuries incurred in the scope of that work. *Supra*, 122 Nev. at 1224-1225.

As quoted above, the test is not whether THORNTON was licensed pursuant to Chapter 624 but whether it was "carrying out work under some principal contractor's NRS Chapter 624 license." It is undeniable that THORNTON was "carrying out work" under Marnell's license. Marnell has a general contractor's license pursuant to Chapter 624. A general contractor's license would undeniably include concrete. Further, the work Marnell was doing (constructing the Wynn out of concrete) was the same work that THORNTON was doing. In fact, both Marnell and THORNTON were contractually obligated to do the same work; Marnell, however, chose to have someone else "carry out their work" for it under a subcontract.

This analysis is entirely consistent with NRS 616A.210 which extends "statutory employee" status to subcontractors and independent contractors working under the same general contractor. If one direct Marnell employee injured another person hired by Marnell, they would certainly be deemed co-employees and unable to sue each other. There is no valid legal distinction between employees of a concrete pumping company hired by Marnell, and direct Marnell employees when it comes to co-employee immunity.

Yet, Plaintiff is stuck on the issue of licensure and argues that "[f]or the immunity of suit to attach, both parties must be licensed." *Opening Brief ("OB")* at 4:27. At the trial level, Plaintiff dubbed this "no license, no immunity" which is, at best, an oversimplification resulting in an inaccurate statement of law. For example, in *Lipps* the Nevada Supreme Court expressly found an *unlicensed independent contractor to be a statutory employee* of the licensed principal contractor. *Lipps v. Southern Nevada Paving*, 116 Nev. 497, 500, 998 P.2d 1183 (2000) (incidentally, *Lipps* was decided three years

after *Ortega*).

If Plaintiff's proposed "test" were adopted, only the licensed general contractor would be immune from suit under the NIIA and NRS 616A.210 would become a nullity. Like THORNTON, individual employees of a general contractor are generally not individually licensed. By way of example, if Plaintiff had been injured by an individual co-employee, *i.e.* John Doe, Mr. Doe would similarly be unlicensed and, using Plaintiff's "test", liable for Plaintiff's injuries. Clearly, such absurdity is not the law in Nevada. *See, Howard, supra*, 98 Nev. 87 (immunity between co-employees). What is important is not THORNTON'S status as a licensed contractor, but rather its status as a statutory employee of Marnell, which is the licensed principal contractor. The undisputed facts demonstrate that THORNTON was a subcontractor of Marnell. Accordingly, THORNTON was Marnell's statutory employee.

"The scope of this 'statutory employer' definition is broadened for principal contractors, however, which are usually deemed the statutory employers not only of their directly hired employees, but also of the employees of their subcontractors and independent contractors." *Richards, supra*, 122 Nev. at 1219. However, Plaintiff argues that for an unlicensed contractor, such as Defendant, the Court must look to the *Meers* test to determine whether immunity applies. Id. *Arguendo*, while the *Meers* test should not be required in the instant case, THORNTON would meet that test as well.

B. Appellant's reliance on Ortega is misplaced and confused

Presumably due to similar facts involving concrete pumping, Plaintiff reveres the *Ortega* precedent as holy writ which should control in the instant case. Granted, *Ortega* reversed summary judgment in that instance, but simply returned the question to the trial court for application of the *Meers* test. While *Ortega* has not been directly overruled, its decision was largely based on *Tucker v. Action Equipment and Scaffold Co, Inc., 113 Nev. 1349, 951 P.2d 1027 (1997).* "Pursuant to our holding in *Tucker*, in a construction case involving an unlicensed contractor, the relevant inquiry is whether Ortega was in the

'same trade, business, profession or occupation' as LVP at the time of the accident." *Ortega*, *supra*, 113 Nev. at 1364. *Tucker*, on which *Ortega* heavily relied, was overruled on this specific point in *Richards*. *Richards v. Republic Silver State Disposal,* 122 Nev. 1213, 148 P.3d 684, 689 (2006) (lacking mention by name of each case of *Tucker*'s progeny, including *Ortega*, when it overruled *Tucker* in part). For this reason, Plaintiff's reliance on this precedent is dubious.

Plaintiff also tries to focus on dicta of the *Ortega* case, which discusses whether concrete pumping services may be licensed by the contractor's board. In an apparent attempt to extrapolate this dictum to his advantage, Plaintiff makes the nonsensical argument that, "In reality Thornton was a service provider and not a subcontractor." *OB* at 3:21-22.

In fact, Plaintiff goes so far as to misquote this Supreme Court, by attributing an affidavit summarized in the procedural history to a finding of the Nevada Supreme Court. *OB* at 3:3-10. Yet *Ortega* court actually rejected this argument. The language of *Ortega* relied on by Plaintiff to demonstrate that concrete pumping services work does not fall within the definition of contractors/subcontractors in NRS 624.020, is not the holding of the case. *Ortega*, *supra*, 113 Nev. at 1362. This Court's words were, "***We reject SIIS's contention that Ortega was not a 'contractor'*** pursuant to NRS 624.020(3) because it was merely a supplier of equipment to the job site." *Id.* at 1364 (emphasis added).

Additionally, this contention is specifically rebutted by the subcontract: "Contractor [Marnell] desires to subcontract out to Subcontractor [THORNTON] a portion of the labor, materials, equipment and services to be supplied on said project[.]" *See*, *ROA* at 151 *et. seq.* As set forth in the subcontract, THORNTON was hired by Marnell as a subcontractor to perform a part of the overall project. There is no dispute that THORNTON did in fact perform the work it was contracted to perform at the project. Accordingly, as THORNTON provided a portion of the labor, materials, equipment and services that went into the completion of the project, it cannot be considered merely a "supplier" for purposes of the NIIA.

C. Alternatively, whether THORNTON qualifies as an employee under the Meers test

Despite the plain language of NRS 616B.603 and its application to the undisputed facts of this case, Plaintiff has repeatedly argued that the holding in *Ortega* mandates application of the test embodied in *Meers v. Haughton Elevator*, 101 Nev. 283, 286 (1985). While Defendant disputes the *Meers* test must be applied in the instant case[3], the plain language of *Meers* only serves to support further Defendant's position that it is the statutory employee of Marnell. *See*, *State Indus. Ins. Sys. v. Ortega Concrete Pumping, Inc.*, 113 Nev. 1350 (1997).

In *Meers*, the plaintiff worked in the business office of Central Telephone Company and was injured due to an elevator malfunction as she was leaving work. Despite receiving worker's compensation benefits from her employer, Meers then civilly sued Haughton Elevator Company (which had a contract with her employer for maintaining the elevator). The elevator company was granted summary judgment by the trial court based upon the argument that because it was hired by Central Telephone, the employer of plaintiff, was a "statutory employee" of Central Telephone, a co-employee with plaintiff, and thus, immune from suit. In *Meers*, at footnote 3, the Court wrote:

> It is easy to see that ***in the construction business, sub-contractors and independent contractors will invariably be held to be statutory employees of the general contractor.*** Outside the construction field, however, determining which sub-contractors and independent contractors are employees for purposes of the Act is a determination of great importance. (Emphasis added)

Therefore, for non-construction cases, this Court devised the so-called *Meers* test, in which the type of work performed by the sub-contractor or independent contractor would determine whether the defendant is a statutory co-employee. Anticipating

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[3] While *Ortega* has not been directly overruled, *Ortega* followed the *Tucker* rationale but was not mentioned in the *Richards* decision when it overruled *Tucker* in part, as discussed above.

Plaintiff's insistence that the same result reached in *Ortega* be applied here, namely that the summary judgment be reversed and the matter remanded to undergo a *Meers* analysis, THORNTON addresses that here.

> "The test is not one of whether the subcontractor's activity is useful, necessary, or even absolutely indispensable to the statutory employer's business, since, after all, this could be said of practically any repair, construction or transportation service. The test (***except in cases where the work is obviously a subcontracted fraction of a main contract***) is whether that indispensable activity is, in that business, *normally* carried on through employees rather than independent contractors" *Id.*, at 287 (emphasis added); also cited with approval in *Richards, supra*, 122 Nev. at 1220.

Notably, the *Meers* decision supports the proposition that the test is not even reached if the work done is "obviously a subcontracted fraction of the main contract." ***It is an undisputed fact that THORNTON was performing work which was a "subcontracted fraction of the main contract"*** of licensed contractor Marnell. Tellingly, *Meers* makes the specific exception for cases where the work performed is an obvious subcontracted function of a main contract because the subcontractor logically must be in the same business as the primary contractor because it has obligated itself to perform a portion of the main contract. Because THORNTON is a subcontractor of Marnell, it follows that THORNTON ***must be*** a statutory employee of Marnell.

The idea that a sub-contractor will invariably be held to be a statutory employee of the general contractor as noted in *Richards* and *Meers* is well documented. "An employee of a sub-subcontractor is deemed an employee of the principal contractor, and the exclusive remedy of such employee injured in the course of his employment is limited to benefits contained in [the NIIA]." *Stolte, Inc. v. Eighth Judicial Dist. Court*, 89 Nev. 257, 260 (1973). "Initially, if the defendant in a construction case is not a principal contractor licensed pursuant to NRS chapter 624, or is not ***working pursuant to a construction agreement with such a licensed principal contractor***, the *Meers* test must be applied to determine immunity." *Lipps, supra*, 116 Nev. at 500 (emphasis added) (ruling that an *unlicensed* independent contractor performing services for a subcontractor was a statutory

employee of the principal contractor).

Simply stated, because the work performed by THORNTON was a subcontracted fraction of the work undertaken by Marnell, the work performed by THORNTON is work that is normally carried on through Marnell's employees. Accordingly, THORNTON is a statutory employee as defined by *Meers*. The trial court's conclusion in this regard is well-founded and should be upheld on appeal.

II. WHETHER THE DISTRICT COURT ERRED IN FINDING NIIA IMMUNITY EXTENDS TO ALL APPELLANT'S CLAIMS, PARTICULARLY INCLUDING HIS PRODUCT LIABILITY CLAIMS

The issue of products liability and the dual capacity doctrine arises from Plaintiff's attempts to avoid the exclusive remedy provisions of the NIIA. Therefore, if the NIIA does not apply to this matter as Plaintiff argues, it does not matter whether the dual capacity doctrine is recognized in Nevada or this case because Plaintiff's claims would not be barred. However, as the exclusive remedy provisions of the NIIA do apply (as set forth in Section I), Plaintiff's efforts to circumvent the NIIA's scope must be addressed.

Plaintiff's arguments regarding the dual capacity doctrine are somewhat confusing and sprinkled throughout his OB. In the OB section entitled "Products Liability and Dual Capacity Doctrine," Plaintiff argues that the dual capacity doctrine does not apply to this case because the NIIA does not apply. *See*, *OB* at 14:25-26. However, only paragraphs earlier, Plaintiff argues that the NIIA should not be the sole remedy when a service provider participates in welding (*i.e.*, is serving in a dual capacity). *See*, *OB* at 13:23-24. Plaintiff's argument is duplicative and irreconcilable. The position that the NIIA should not apply to bar Plaintiff's claims because Defendant was a service provider or "remanufacturing a boom" cannot be construed as anything except for a dual capacity argument. *See*, *OB* at 13:25-26. In fact, a subcontractor providing a service and a supplier of a product are the same dual capacities addressed in the *Noland* case.

In *Noland*, a plaintiff brought suit against Westinghouse due to an injury that occurred at a construction project involving a defective elevator. *Noland v. Westinghouse*

Elec. Corp., 97 Nev. 268, 268-269 (1981). Both the plaintiff's direct employer and Westinghouse were subcontractors of the general contractor. *Id.* Westinghouse was the manufacturer, seller, supplier and installer of the defective elevator. *Id.* The lower court properly found Westinghouse to be the statutory co-employee of the plaintiff and granted summary judgment in favor of Westinghouse due to NIIA immunity. *Id.*

On appeal, that plaintiff contended the Court should adopt the dual capacity doctrine, which would allow him to assert a products liability claim against Westinghouse. *Id.* at 269. The dual capacity doctrine, which has ***not been adopted in Nevada***, provides that an "employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer." *Id.* at fn1. The *Noland* plaintiff argued that Westinghouse had been acting in a capacity in addition to simply a subcontractor, namely that of a supplier of products. *Id.* at 269. This court rejected adoption of the dual capacity doctrine and ruled there was "no valid reason to deny Westinghouse, as the statutory co-employee of Plaintiff, the immunity afforded by NIIA." *Id.* at 270.

The same result has been reached in subsequent decisions. In cases where plaintiffs sought to avoid NIIA immunity afforded to statutory co-employees on the theory that the alleged tortfeasors acted not only as co-employees, but also in other capacities such as a product supplier or a landlord, the dual capacity doctrine has been rejected. *See*, *Harris v. Rio Hotel & Casino*, 117 Nev. 482, 490-491 (2001); *see also*, *Watson v. G.C. Associates Ltd. Partnership*, 100 Nev. 586 (1984); *Howard v. District Court*, 98 Nev. 87, 90 (1982). In fact, the only case in Nevada relying on the dual capacity doctrine, *Karadanis*, was expressly overruled by *Harris*. *Harris*, *supra*, 117 Nev. at 491; *overruling*, *Karadanis v. Sourwine*, 105 Nev. 793 (1989).

In light of the extensive precedent on the matter, if the NIIA is found to be applicable, as set forth in Section I, *supra*, the exclusive remedy provisions of the NIIA would apply to bar Plaintiff's claims, including any claim for products liability. For all of

Plaintiff's attempts to distinguish this matter from *Noland*, his argument is nearly identical to the argument this Court previously rejected. There, Westinghouse was the manufacturer and supplier of the defective equipment in addition to being a statutory co-employee. Here, Plaintiff argues that THORNTON was both a service provider and remanufacturer of the defective boom. *See*, *OB* at 13:24-26. Just because the dual capacities that Plaintiff attributes to THORNTON have not been specifically addressed in previous precedent does not somehow dictate a different result.

Plaintiff's further attempts to distinguish the relevant precedent from the instant matter are off-point and generally focused on issues that are not pertinent to the issue. *See*, *OB* at 13:23-14:14. For instance, the *Flanders* court held that the NIIA does not bar intentional tort claims because they are not accidents, while reaffirming that the NIIA generally provides the exclusive remedy for an injured employee. *Flanders v. Riverside Resort & Casino, Inc.*, 245 P.3d 1159, 1163 (Nev. 2010). Its holding does not help Plaintiff's argument that he should be able to pursue more than one theory of liability despite the NIIA because there are no intentional tort allegations. *See*, *OB* at 13:23-14:2. Likewise, Plaintiff's arguments regarding licensure and landowners are equally misplaced, as discussed previously.

Plaintiff's sole remedy against Defendant is limited to the NIIA, regardless of the capacity he alleges Defendant was acting in, because THORNTON was a subcontractor of Plaintiff's employer. *See*, *ROA* at 151-157 (subcontract agreement), and at 109 (OSHA recognition of subcontractor status).

III. OVERLOOKING THE ISSUE OF RIPENESS, WHETHER THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES AND COSTS WAS PROPER

Unlike a motion for summary judgment, an award attorney's fees "is within the sound discretion of the trial court." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1353-1354 (1998); *Bergmann v. Boyce*, 109 Nev. 670, 674 (1993). "A district court's award of attorney's fees will not be disturbed on

appeal absent a manifest abuse of discretion." Id.; *Nelson v. Peckham Plaza Partnerships*, 110 Nev. 23, 26 (1994). Despite this high threshold, Plaintiff simply focuses on re-arguing the underlying motion rather than addressing the proper standard on appeal. While Plaintiff's failure to present any substantial argument on the abuse of discretion issue is itself fatal to his appeal, the largest problem is the fact that the lower court has not yet entered a final order on the issue of attorney's fees.

"The district court's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective for any purpose and cannot be appealed." *Rust v. Clark County Sch. Dist.*, 103 Nev. 686, 688 (1987). Due to this sharp delineation of the transfer of jurisdiction, a premature appeal fails to vest jurisdiction in the Nevada Supreme Court. Id. Therefore, the amount or even the grounds for such an award are left to speculation, although it appears Plaintiff has addressed all bases under which Defendant sought fees. This is particularly apparent as Plaintiff goes so far as to argue that the "attorneys fees are unreasonable and excessive" (*OB* at 17:16) despite the fact that neither Plaintiff nor Defendant knows the amount of fees the trial court may ultimately award.

Despite the fact that no order has been entered, Plaintiff argues that the trial court erred in determining Defendant was entitled to attorneys fees. Plaintiff's argument as to why Defendant is not entitled to recover its fees can be summarized in three points: (1) Defendant did not obtain a money judgment (*See*, *OB* at 17:11-12); (2) Defendant was not successful on its first motion for summary judgment (*See*, *OB* at 16:26-28); and, (3) a court cannot award fees without considering the *Beattie* factors (*See*, OB at 17:5-7). While these are generally true statements, none of them are applicable to the instant matter.

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A. There is No Requirement That Respondent Obtain a Money Judgment in Order to Recover Attorney's Fees under the Applicable Standards

Appellant focuses on the requirement for an award of a money judgment in order to obtain fees pursuant to NRS 18.010(2)(a)[4], as he unsuccessfully relied upon at the trial level. *See*, OB at 15:22-26; 17:8-12. However, as Defendant illustrated in the lower court, this argument is irrelevant because Defendant did not rely on NRS 18.010(2)(a); rather, Defendant based its Application for fees on NRS 18.010(2)(b) (permitting fees for a meritless lawsuit) and NRS 17.115[5] (permitting fees for bettering an offer of judgment).

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[4] NRS 18.010(2) Award of attorney's fees.
2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a prevailing party:
(a) When the prevailing party has not recovered more than $20,000; or
(b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party. ***The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations***. It is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public. (Emphasis added)

[5] NRS 17.115 Offer of judgment.
4. Except as otherwise provided in this section, if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court:
(a) May not award to the party any costs or attorney's fees;
(b) May not award to the party any interest on the judgment for the period from the date of service of the offer to the date of entry of the judgment;
(c) Shall order the party to pay the taxable costs incurred by the party who made the offer; and
(d) May order the party to pay to the party who made the offer any or all of the following:
(1) A reasonable sum to cover any costs incurred by the party who made the offer for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case.

Unlike NRS 18.010(2)(a) which is dependent on the plaintiff's recovery, NRS 18.010(2)(b) expressly provides for recovery of attorney's fees "[w]ithout regard to the recovery sought[.]" Therefore, any argument regarding the requirement of a money judgment is beside the point.

B. Appellant's Success in Defending Respondent's First MSJ Has No Bearing on the Issue of Attorney's Fees, and the Circumstances Actually Support Respondent's Position

Plaintiff argues that the trial court's denial of Defendant's original MSJ without prejudice somehow precluded the trial court from later concluding the suit was meritless. Unfortunately, this argument fails for two reasons. OROZCO relies on *Berosini* for the proposition that attorney's fees cannot be awarded under NRS 18.010(2)(b) against a party who survives summary judgment, but as discussed in more detail below, Plaintiff's reliance on *Berosini* is misplaced on this issue because the applicable law has changed since it was decided. *See*, *Berosini, supra*, 114 Nev. 1348. Finally, the fact that Defendant was not successful on its first MSJ was not a result of some finding on the merits, but rather Plaintiff's request for additional discovery.

The problem with Plaintiff's reliance on *Berosini* is that NRS 18.010(2)(b) has fundamentally changed on this very point since the *Berosini* decision. *Supra*, 114 Nev. at 1354. When *Berosini* was decided in 1998, the pertinent portion of section NRS 18.010(2)(b) permitted an award of fees: "when the court finds that the claim [...] ***was brought without reasonable ground*** or to harass the prevailing party." *See*, 2003 Nev. ALS 508, 153 (emphasis added). Since the *Berosini* decision, NRS 18.010(2)(b) was

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(2) Any applicable interest on the judgment for the period from the date of service of the offer to the date of entry of the judgment.
(3) Reasonable attorney's fees incurred by the party who made the offer for the period from the date of service of the offer to the date of entry of the judgment. If the attorney of the party who made the offer is collecting a contingent fee, the amount of any attorney's fees awarded to the party pursuant to this subparagraph must be deducted from that contingent fee.
(Emphasis added)

amended by the Nevada Legislature in 2003 to its current form, which permits an award of fees: "when the court finds that the claim [...] ***was brought or maintained without reasonable ground*** or to harass the prevailing party." NRS 18.010(2)(b) (emphasis added). Accordingly, the *Berosini* court's focus was on the initiation of the action only, so if an action survived summary judgment, then it must have been brought in good faith. Meanwhile, a court's analysis under the current version of NRS 18.010(2)(b) must also consider whether a plaintiff maintained his action after learning it was without merit. Whether a claim was originally brought in good faith is a separate issue from whether it was ***maintained*** in good faith.

In following with the plain language of NRS 18.010(2)(b), the trial court's analysis focused not only on whether an action was originally brought with reasonable grounds, but also whether it was maintained with reasonable grounds. Plaintiff sets forth a significant argument as to why he believes his action was originally brought in good faith (*See*, *OB* at 15:6-21), yet Plaintiff was clearly cognizant of NIIA immunity because his employer Marnell was not named in his suit. *See*, *ROA* at 431. In fact, Plaintiff's primary opposition to the original MSJ was that the first motion for summary judgment was made five months before the discovery cut-off and Plaintiff required additional discovery to investigate whether NIIA immunity applied to THORNTON in the instant case. To permit Plaintiff his requested time, the MSJ was denied pursuant to NRCP 56(f).

Two years elapsed between Defendant's first MSJ, filed on April 22, 2008, and the dispositive motion, filed on May 14, 2010. At least eight depositions were taken and countless documents exchanged in the course of discovery. Therefore, when the second MSJ was files Plaintiff was without the excuse that he had not had enough time to conduct discovery and judgment was entered for Defendant on the same grounds that the original MSJ had been brought under. The fact that Plaintiff was unable to uncover any evidence to support its defense in the two years between motions is more than enough to support any finding by the trial court that Plaintiff's action was maintained without reasonable grounds.

Additionally, Plaintiff mentions the "American Rule" of attorney's fees, which states each party is to bear its own attorney's fees. However, the Legislature included the following language in NRS 18.010(2)(b) to clarify its position with regard to fees in situations such as this: "The court shall liberally construe the provisions of this section in favor of awarding costs, expenses and attorney's fees in all appropriate situations." *See*, 2003 Nev. ALS 508, 152. The Legislature added this codification of its intent because meritless claims, such as Plaintiffs against THORNTON, impose a burden on the courts and on those who must defend against the claims. *Id.* Therefore, while Plaintiff would have the Court read *Berosini* to strictly construe NRS 18.010(2)(b), the Legislature has clarified and codified its intent that the Court is to do the opposite.

C. The Record Reflects That the Trial Court Properly Considered the Beattie Factors, Making Its Award of Attorney's Fees Proper

Appellant is correct that the trial court must consider the *Beattie* factors prior to awarding attorney's fees and failure to do so constitutes an abuse of discretion. *See*, *OB* at 17:5-7. However, notably absent from Plaintiff's argument is any allegations that the lower court somehow failed to consider the *Beattie* factors – because they were properly considered. See *Beattie v. Thomas,* 99 Nev. 579, 588-592 (1983).

A district court is only required to consider each of the *Beattie* factors, but it does not necessarily have to include them in its order. *Wynn v. Smith*, 117 Nev. 6 (2001). Where the papers submitted in support of and in opposition to the motion for attorney's fees were sufficient to enable the court to consider each of the *Beattie* factors and conclude that the amount of fees sought was reasonable and justified, it is not an abuse of discretion in awarding attorney's fees without making specific findings on the four factors. *See*, *MRO Communications, Inc. v. AT&T Co.*, 197 F.3d 1276, 1283-84 (9th Cir. 1999) (interpreting NRCP 68 and *Beattie*).

In the instant matter, the pleadings in support of Defendant's application for attorney's fees were sufficient to enable to court to consider the *Beattie* factors.

Defendant's application specifically addressed each of the four factors in turn. *See*, *ROA* at 401:6-402:23. Meanwhile, Plaintiff's opposition did not even address Defendant's right to recover pursuant to its offer of judgment. *See*, *ROA* at 584:18-20 (Defendant's Reply noting no opposition). The point being, Defendant addressed the *Beattie* factors in its Application, which was considered by the trial court. While there is no written order to confirm the court's consideration of the factors, none is required. *Wynn*, *supra*, 117 Nev. 6. Accordingly, the determination can be made that the trial court's award of fees to Defendant is proper even without the trial court's written order awarding a sum of attorney's fees to Defendant.

IV. CONCLUSION

WHEREFORE, THORNTON CONCRETE PUMPING requests that this High and Honorable Court affirm the judgment in its favor, as well as the award for attorney's fees and costs.

RESPECTFULLY SUBMITTED this 12th day of September, 2011.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 12th day of September, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of September, 2011, I served the foregoing documents described as **RESPONDENT'S ANSWERING BRIEF**, on the parties set forth below by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada.

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